



Philippine Journal of Development  
Number 52, Volume XXVIII, No. 2, Second Semester 2001



## Questioning de Soto: The Case of Uganda

RAEWYN ISABEL PORTER\*

### ABSTRACT

The 1995 Constitution vested land in the citizens of Uganda. Accordingly, in 1998, Parliament passed a law to re-regulate the myriad land relations accreted from past and contemporary *de jure* laws and *de facto* practices. The Land Act of 1998 manifests 100 years of contest over land and governance in Uganda; a contest made contemporary by Hernando de Soto's (2000) book, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. This paper argues that governmentalities associated with land law articulate an enduring teleology of development in which land has always been crucial. In sustaining the transition from a past "tradition" to a "modern" future, an equivalence is constantly created and reaffirmed with what "is" and what "ought to be." Imprisoned by the normative dualisms of past and future, is and ought, tradition and modern, orthodox discourse about land distorts "here and now" lived realities. Uganda's route to formalization underscores an evolving process whereby the Land Act of 1998 affirmed what was inevitable. Yet implementation is proving slow and difficult.

### INTRODUCTION

The paper draws on research undertaken in Uganda between 1997 and 2000 to examine current claims for formalization of the land and housing assets of the poor recently popularized by Hernando de Soto. De Soto stresses that fixed, established, secure

---

\* The author holds a Ph.D. from the Royal Melbourne Institute of Technology (RMITU) in Melbourne, Australia. Her Ph.D. dissertation entitled "100 Years of Contest: Land and Governance in Uganda" where this article was based builds on her 15 years of research, advocacy and policy practice with land, housing and public sector reform and social policy issues.

property rights and contract enforcement can turn the “dead capital” of the poor into economic growth capital. He argues that the informal property arrangements of the poor ensure that they remain poor. Since they hold their assets in defective forms, the poor cannot transform them into working capital as Western owners do when they represent legally owned property as collateral for loans. Readers may wonder why and how this is relevant in a Philippine setting and in this journal. The relevance is due to the popularity of De Soto’s work in the Philippines and President Gloria Arroyo Macapagal’s announcement (*Philippine Daily Inquirer*, 24 November 2001) that she is setting up a committee to determine how his principles may be applied in the Philippines.

I argue that contemporary experience in Uganda must be understood as the accretion of historical contests between the actions of the state (variously, Buganda *Lukiiko* [Buganda Parliament], Protectorate administration, various post-independence nation states) and the “everyday people” (variously, owners, tenants, squatters, land occupants) through which both *de jure* and *de facto* regimes of land access are created, negotiated, and sustained. This proposition contrasts with much academic discourse that depends on the creation of a difference that misconstrues actually evolving relations of access. Official discourse understands the present in terms of a teleological transition, from a past (tradition) to a future (modern), in people’s relations to land. In this conception of land access, tradition is seen as the past, whereas the modern is taken for granted as the future, and is automatically considered what “ought” to be. The transit from one state to another is inexorable, because all rich societies have modern systems of tenure, whereas poor societies have, by definition, traditional relations between people and land. This teleology reinforces a tendency to over-play, to overdetermine, the role of “structural imperatives” (such as regulatory regimes introduced by the state) in determining land access, at the expense of local agency to hybridize tradition and modernity for local advantage. In other words, this profoundly distorts the lived

experience I observed in Kampala as a result of my examination of the past. But it does more than that, for these conceptions are today backed by the persuasive and coercive powers of international agreements that reinforce orthodoxy and, in an aid-dependent economy and polity like Uganda, point to equally important ethical and political shortcomings as well. The following story illustrates my point. It emanates from de Soto's book and is my paraphrased version of what appeared in *The Economist*, March 31–April 6 2002, under the banner story, “No title.”

#### “NO TITLE”

People in poor countries have assets—lots of them. But because they rarely have formal titles, they cannot use these assets as collateral to raise cash. In a typical African country, barely one person in ten lives in a formal house, and only one worker in ten holds a formal job. While leaders of poor countries beg the rich world for aid and prostrate themselves before potential foreign investors, they fail to realize that there is a much larger potential source of funds at home. There are trillions of dollars all ready to be put to use.

Grace and John need 20,000 Malawian Kwacha to expand their goat-slaughtering business. They have assets of 25,000 Kwacha held in a bungalow they built on a plot of “customary land.” That is, the plot's previous owners had no formal title over the land; it was simply part of a field that the family had cultivated for generations and then sold to new urban dwellers. Surely they could borrow the money using the house as security? No, because they cannot prove that they own it. John and Grace have a contract signed by the local chief, but no bank will accept it as collateral because it is not enforceable in a court of law. Rather, it is an expression of traditional law, which is usually unwritten, unpredictable, and dependent on the chief's whim. So the house is dead capital; they own it but cannot make its value work for them.

All rich industrialized countries have secure property rights, accessible to more or less all citizens. No poor country has. Better property laws are not the only reason that some countries are richer than others, but they clearly make a difference. Many poor countries, recognizing this, are trying to devise ways to make their property systems more inclusive. But the hurdles are high. Lawyers often oppose attempts to simplify the law. Tribal chiefs resist changes that may reduce their power. People who live in traditional rural communities are often wary of alien ways of doing things. Poor countries' efforts at reforming property laws have rarely succeeded. In every poor village, anywhere in the world, people know exactly who owns what. The challenge for governments in poor countries is to take that information and form it into a clear and enforceable set of laws. The alternative is to stay poor.

What does the author of "No title" ask us to take at face value? How is the idealized what "ought to be" constructed against a presumed what "is"? Firstly, it asserts that leaders of poor countries have no agency; they are inactive; and they are as poor in intellect as their countries are in wealth. They "fail" to see what is obvious to the rich countries (i.e., that there is plenty of wealth right under their noses). Instead, they "beg" and "prostrate themselves" for aid and investment. Secondly, it states that aid and the benefits of investment flow only downward—that there is no self-interest in the rich countries lending and/or investing in poor countries. It ignores claims that now, more than ever in capitalist history, the profits from finance capital are made from debt and exponential debt creation that requires circulation of money rather than old-fashioned economic function (Hoogvelt 1997).

Let us examine the following assertions of the author.

***"There are trillions of dollars all ready to be put to use."***

The presumption is that outside of the globalized capitalist

system and its parallel circulation of securitized debt, the assets held by the poor have no use, no secondary purpose. This is far from the reality of Kampala's urban and peri-urban dwellers at least. Plots and dwellings are used intensively 24 hours a day for activities—ranging from cropping, raising pigs, ducks, rabbits . . . brewing alcohol, renting rooms or beds, preparing food for sale, sewing, hairdressing, to child caring—that all have an economic function and produce income that can be used for consumption of goods and services and/or investment.

***“The plot's previous owners had no formal title over the land.”***

The informal land market that provided for the sale of the land to John and Grace is ignored. The previous owners had found themselves with peri-urban land that had appreciated with demand. It had become more valuable to carve up and sell than to cultivate. There was a willing seller and a willing buyer, and money changed hands in a land market for informal rights.

***“Surely they could borrow the money using the house as security.”***

The article asserts that John and Grace cannot prove that they own their house. However, they can prove that they own their land and house; they have a contract signed by the local chief “for a fat fee” (probably for less than the real estate, solicitor, and bank valuation fees payable in rich countries). This contract is proof of ownership and this is security. Other participants in the informal land market in the village and the wider locality would view this contract as proof of ownership. The fact that a commercial bank may not accept it because it is not secured by the state and guaranteed by law is a different matter, but it doesn't undermine their proof of ownership. All it says is that John and Grace's contract has insufficient value for a particular paper system that rich countries prefer. Secondly, it asserts that the only way of raising capital is through commercial banks. That people may have other means is not explored. For example, without the benefits of the banking system, John and Grace raised enough Kwacha to

buy the plot and build the house in the first place. How did they do this? They are not in debt, they don't have a mortgage, and they have an asset of 25,000 Kwacha. However they got the Kwacha together in the first place, maybe they can do it again. Or maybe they can rent out a room in their house, or build an extra room for rental, or rent out their entire plot and house and rent a cheaper place, the rental difference going toward the expansion of the goat-slaughtering business. Or maybe they can get credit on the live goats until they are slaughtered and sold. The point is that poor people do have ways of accessing capital outside of the formal system and they do make investments in land "they cannot prove they own." How else would they have accumulated the recently revealed "staggering value" of their assets?

***"It is an expression of traditional law, which is usually unwritten, unpredictable and dependent on the chief's whim."***

The statement asserts that traditional law is negative because it is unwritten, unpredictable, and dependent on a chief's whims and, by implication, that *de jure* law is written, predictable, and knowable. In reality practice is seldom traditional ("tradition" being the creation and re-creation of colonial administrations and administrative chiefs to define and fit practices into the new legal forms) and has seldom remained unchanged. What is asserted as traditional has always been fluid and changing, but this is not to say it is unpredictable. One way change occurs is that actors draw down elements of the *de jure* or modern into tradition, thus creating hybrid practices that make local sense of evolving changes. The writing and signing of contracts (formalising) for exchanges of untitled land is a case in point. Moreover, the poor do have agency, they act in given situations; they are not passively waiting for modernization to happen to them.

***"All rich industrialized countries have secure property rights."***

Again, there is a clear sharpening of difference by the use of inclusion and exclusion: "all rich countries," "no poor country."

In a similar vein, life for the poor is asserted to be short, sharp, and nasty. Everyone, including family, neighbors, the village chief, and the administration, is out to cheat you, deny you help, act unpredictably, grab your land, and so on. But, miraculously, all that will change when land is titled, the assertion being that the adoption of the new instruments of governance will change conduct from being immature (willful) to mature (based on reason). Moreover, bureaucracies that are currently riddled with jurisdictional overlaps and internal conflicts can be trusted to enact fair land laws, set up transparent and accountable land-administration institutions, and adjudicate fairly when dual or conflicting interests in land are exposed. In discussing the importance of legalizing informal settlements, the author has completely failed to question the nature of the legal system that generated illegality in the first place. It is implied that when poor countries recognize that good property laws “clearly make a difference,” they rarely succeed due to the resistance of people protecting their own interests, an irrational and unprogressive claim to the status quo. That property relations are evolving all the time as people adapt to new circumstances, increased pressure on land, new market opportunities, new forms of local administration, new regulations, and so on, are denied.

***“The challenge for governments in poor countries is to take that information and form it into a clear and enforceable set of laws. The alternative is to stay poor.”***

In conclusion, the author asserts that there is no other choice: adopt the obvious solution or stay poor. But let us ask some questions anyway. If “people know exactly who owns what,” what is the added value of a piece of paper for what everyone already knows? Why invite government intervention in local land relations for a piece of paper? What everyone may know is that property rights can be ambiguous and subject to ongoing interpretations. The choices are not as “sharp-edged” as the author asserts. Legally sanctioned forms of ownership do not necessarily mean absolute

rights or the absence of contesting claims. All laws, whether in rich or poor countries, are perennial sites of struggle.

The story “No title” manifests at least a hundred years of contest over land and governance. Why? First, because the author both claims and imposes “is”—how it is in poor countries, what is the nature of land holding, what is tradition, etc. Second, the author claims a what “ought to be”—an idealized situation that represents the what “is” for rich countries. Thirdly, the author presumes that if the “is” of poor countries is transformed into the “ought,” poverty will be alleviated and, opportunities will come. Stability will prevail; development will have occurred. In this way I claim that “No title” is a contemporary manifestation of what my research suggests has occurred for the past 100 years in Uganda. Moreover, I argue that accounts such as “No title,” and more generally normative discourses, are powerful because they generate persuasive realities by which readers come to know the truth about things, in this instance land relations and administration in poor countries.

I will now turn to the key events in Uganda’s history that shaped contemporary *de jure* law and *de facto* practice (the informal), with an emphasis on mailo land<sup>1</sup> (freehold) in Buganda.<sup>2</sup> This will be followed by an examination of the main features of the Land Act of 1998 and its mandate to regulate formally recognized dual rights in land.

## DEVELOPMENT OF INFORMAL LAND PRACTICES IN UGANDA

### 1900 Agreement

The 1900 Agreement between the British and Baganda fixed Buganda’s once fluid boundaries, established the institutions needed for indirect rule and formulated a land settlement. The

<sup>1</sup> Baganda rendering of the English word “mile.” Square miles of land allocated in freehold title under the 1900 Agreement.

<sup>2</sup> The Buganda Kingdom was the most powerful in what became Uganda and controlled the most fertile land areas around Lake Victoria. The capital of the Buganda Kingdom was located in what became Uganda’s capital city—Kampala.



land settlement vested in the Kabaka (the Buganda King), the Royal family, regents, ministers, and chiefs, specified amounts of land to be held in freehold title. The remaining land in Buganda was vested in the British Crown. The 1900 Agreement transformed the Kabakaship into a constitutional monarchy when it created the *Lukiiko* (Buganda Parliament) and filled it with *bakungu* chiefs—the new landowners. Over time the prevailing Baganda land practices underwent considerable changes as did the relations between the Kabaka and the chiefs and the chiefs and the *bakopi* (peasants) who had, prior to 1900, given *envujjo* (tribute) for the use of land and the chiefs' protection.

British support of indirect rule sprang from the belief that it was cheaper to grant administrative powers to a local tribe who could control agricultural production and wrest labor, taxes, and provisions from reluctant subjects than to attempt it through direct intervention. This act of governing, or power sharing through native authorities, required the management of the *bakopi* and the control of land, the key agricultural resource. In the early 1900s, it suited both the Protectorate Government and the chiefs to limit the number of large landowners so that those without land (title) would be available as followers, who would work under conditions set by the landowners, and on crops (e.g., cotton) governed by the economic objectives of the Protectorate Government. This imperative underpinned the creation of the “peasant cultivator,” which in return required the subordination of existing social relations and rules on land, even though the chiefs initially tried to fit the new patterns of land ownership and tenancy into ideas and social relations that were important to Buganda (Hanson 1997).

The provision of mailo (freehold title) for a select few in Buganda was soon under pressure. Even before land allocations had been completed, the number of allottees had risen from the 1000 referred to in the 1900 Agreement to 4138 in 1921. Mailo was made especially attractive by the special privileges it carried: the right to be involved in Buganda politics, freedom from tax, and exemption from community labor. Moreover, there was a growing realization

that land ownership carried financial power, which was distinct from the old nexus of land/rule/status. Having created a tradable asset through mailo, the Protectorate Government wanted to discourage the market in land that was emerging—both from demand for titled land from disgruntled tenants and landowners' desire to sell parts of their large estates—as this would undermine national prosperity and stability. The contradictory interests of the Protectorate Government and the mailo landowners became increasingly apparent during the 1920s, a period of high labor demand and high world cotton prices. Increased taxes, imposed by the Protectorate Government, were passed directly to tenants; landlords were increasingly viewed as a group interested only in their own economic welfare and the *bakopi* tenants as a group requiring protection from “rampant landlord exploitation.”

### **1928 *Busuulu* and *Envujjo* Law**

In 1928 the *Busuulu* and *Envujjo* Law was passed after much debate about customary practices and served to reaffirm the Protectorate Government's commitment to the ideal of the “peasant cultivator” by securing hereditary use rights without the right of disposal. The *Busuulu* and *Envujjo* Law ruled that peasant tenants could not be forced off their holdings without a court hearing. Their tenancy could be passed on to the next generation although it could not be divided among heirs and could not be transferred, sublet or sold. In return, the tenant was obliged to pay a set annual fee (*busuulu*) for the use of the land and tribute on produce (*envujjo*) for crops such as cotton and coffee. Another important change was that the right of eviction was transferred from the landowner to the courts. The landlord-tenant relationship would no longer depend on custom for regulation. The courts were to intervene despite the fact that the *Busuulu* and *Envujjo* Law was itself a legal intervention to prop up the so-called customary feudal relations on land. What the Protectorate Government failed to see was that they had constructed a customary model (with the assistance of the self-interested landowning chiefs) to account for past land

practices, and now expected that model to be capable of determining behavior. This was a classic example of constructing what “is” to justify what “ought to be,” backed by the formality of law and power of the court. Instead, land practices moved further and further away from the new *de jure* law. *De jure* law did not result in the desired monopoly on regulation and control of transactions in land.

The manufacture of the colonial ideal, the peasant cultivator with secure tenancy rights, did not stop the commercialization of land. Official colonial land policy retained the ideal of peasant producers, with security-of-use rights but without marketable title, until around 1955. However, this policy ideal ignored the increasing financial independence of tenants and their development of a fledging market in *bibanja*.<sup>3</sup> In earlier landlord-tenant relations, if the holder of a *kibanja* moved to another location the *kibanja* reverted to the landowner. Sometimes, however, tenants would secretly sell their *kibanja* and tell the landowner that a relative was looking after it in their absence. When landowners realized this deception, they began demanding *kanzu* (entry money) from whoever entered the *kibanja*. One intention of the *Busuulu* and *Envujjo* Law was to discourage tenants from sub-letting or selling their *bibanja* in line with official policy to preserve traditional peasant producers with secure-use rights. However, rather than stopping this practice, the new law gave it another twist as the practice of charging *kanzu* was expanded and the fledging market in *bibanja* grew. Once *kanzu* had been paid to enter *bibanja*, holders believed their rights to the land could be transferred or sold. While such transactions started clandestinely, being strictly illegal under the 1928 Law, it wasn’t long before a *de facto* practice was established that permitted the sale of *bibanja* subject to the landowner’s approval of the intended buyer. In effect, *bibanja* holders had taken control of the market in *bibanja* transactions; they became the buyers and sellers of *bibanja* with landlords mediating the market through the charging of *kanzu*

---

<sup>3</sup>Plural of *kibanja*—a plot of land where the occupant has use rights (usufruct).

for the obtainment of permission. The dynamic of the relationship between landlords and tenants had shifted.

### **1962 Independence**

The immediate pre-Independence period was one of intense contest between the Baganda and other factions, whether based on tribal, religious, or other affiliations. By 1955 it was clear that an independent unitary government was unacceptable to the Baganda and that, unless the British protected their political, economic, and social privilege, they would cause the Independence process to collapse. With no easy way of escaping the remnants of indirect rule, the Munster Commission proposed a confusing and ultimately short-lived solution: a “single, democratic state with a strong, central government” that was federated with the Buganda Kingdom “with more powers that it had hitherto” (Ovonji 1990, cited in Oloka-Onyango 1995, p. 157). In 1962, amidst the fanfare of the Independence celebrations, Uganda was given external recognition as a Western-style democracy, but internally the state had little legitimacy.

Negotiations between the British government and the Baganda on changes to occur at independence resolved that the 9000 square miles of land taken from Buganda under the 1900 Agreement and named Crown Land would be returned to Buganda for vesting in the newly established Buganda Land Board (BLB). Additionally, the Baganda delegates to the Constitutional Conference in London won guarantees that there would be no laws altering land tenure in Buganda without the consent of the *Lukiiko*. Having secured their land interests against the future independent Ugandan government, the Buganda turned their attention to the forthcoming elections.

When entry into national party politics became inevitable for the Buganda, the Kabaka Yekka (“king alone” or KY) political party was founded. After much party politicking, an alliance was formed between Obote’s Uganda People’s Congress (UPC) and the Kabaka Yekka; both parties needed the support of the other to ensure victory

over the popular, Catholic-led, Democratic Party. In part, the alliance was formed on the belief that the UPC would not meddle with the land arrangements Buganda had secured with the 1961 Buganda Agreement. Uganda gained independence in October 1962, and a federated government of the UPC and Kabaka Yekka took control with Milton Obote as Prime Minister and Kabaka Mutesa as President.

Under the Public Lands Ordinance, Crown Land outside Buganda was changed to public land under the control of the Uganda Land Commission (ULC) and District Land Boards.<sup>4</sup> The alliance between the parties eventually foundered over a land issue: that of the so-called “lost counties” of Buyuga and Bugangazi.<sup>5</sup> In 1964, President Kabaka Mutesa refused to sign into law both the bill authorizing the referendum and the subsequent bill to effect the transfer of the counties to Bunyoro in January 1965. This issue was not the only point of contest over land control. The UPC wanted to undermine the power of the Kabaka Yekka and its membership of landowners. One way of achieving this objective was to change mailo land from freehold to leasehold, so that the Uganda state owned the land. Obote never achieved this transformation; eventually it was Amin who converted all land to leasehold. Regardless, the alliance was broken over the promises made to the Kabaka Yekka about non-interference with Buganda land.

During the so-called “Constitutional Crisis” of 1966, Obote overturned the 1962 Independence Constitution and assumed all

---

<sup>4</sup> While the colonial administration had used land to secure compliance from chiefs, the Obote Government used land for patronage. The beneficiaries were the influential political appointees on the land boards. Land, including common land was taken and enclosed for ranching all over the country (Kabwegyere 1975).

<sup>5</sup> The Protectorate Government had previously given these two Bunyoro counties to Buganda as a reward for their assistance in quelling unrest in the area. The 1962 Constitution required a referendum to decide whether the administration of the counties stayed with Buganda or returned to Bunyoro. In 1964, the people in the ‘lost counties’ voted to become part of Bunyoro in the District of Kibale. However the Banyoro remained tenants of absentee Baganda mailo landlords. Only ownership of official mailo estates changed hands from Baganda to Bunyoro chiefs.

state power. He presented an interim constitution that undermined the economic and political power of Baganda chiefs by eliminating all official (but not private) mailo estates. The dispute led to insurrection and *inter alia* to the passage of the Public Land (Rents and Profits) Act, 1966. This Act was concerned primarily with the details of the disposal of the expropriated official mailo land (West 1972, p. 95-96). Buganda's defiance culminated in a *Lukiiko* resolution demanding that the central Government remove itself from Buganda soil. Obote responded with a military takeover of the Kabaka's palace, led by Major-General Idi Amin Dada, and the proclamation of a state of emergency in Buganda. Kabaka Mutesa escaped the attack and went into exile in the United Kingdom. The 1967 Constitution replaced the complex unitary and federated form of government of the 1962 Constitution with a unitary central government. It abolished the Buganda kingdom and vested the land held by the BLB in the ULC. Concurrently, Land Boards throughout the country were abandoned and powers were centralized and land vested in the ULC.

### **1975 Land Reform Decree**

Popular discontent with Obote in Buganda, army grievances, and a deteriorating relationship with Amin all had a role to play in the 1971 coup staged by Idi Amin. The coup was initially greeted with a high level of acceptance. However, to the disappointment of the Baganda, it wasn't long before Amin reaffirmed his commitment to a unitary republican state. This evolved into the need for unitary land laws and the pronouncement of the Land Reform Decree (LRD) in 1975. The LRD held that all land formerly in private individual tenure, such as mailo and freeholds, was to be converted to 99-year leases, with 199-year leases for charitable and religious institutions. The leases were to be granted by the state through the ULC. The LRD repealed the *Busuulu* and *Envujjo* Law; tenants on mailo and freehold land became tenants at sufferance. Whatever Amin's motives were, he did what Obote had threatened to do—he vested all power over land regulation in

the state through the ULC. In so doing, he involved the state in the everyday management of land. Clearly, the LRD made tremendous changes in *de jure* law. However, the impact on *de facto* practice was less significant. The inability of governments to implement and administer the laws left significant gaps for the populace to interpret and apply their own meanings to the law. People brought their past to bear on their interpretations of the present and, in so doing, retained a degree of continuity with past land practices. New laws were never able to erase the past or to provide a solid dividing line between past and present. Thus, people's actions reflect both a continuity with the past and a selective pulling down of the new, a hybridization of past and present and of *de jure* and *de facto* practices.

The ouster of Idi Amin in 1979 did not bring an end to hardship and itinerant governance for the people of Uganda. After a fraudulent electoral process in 1980, Milton Obote and the UPC formed a government (Obote II) that received international recognition based on regional, geo-political, and economic agreements made while Obote was still in exile in Tanzania. The British had proposed an arrangement whereby recognition of his resumption of power would be subject to the adoption of free-market policies based on a Structural Adjustment Programme (SAP) and the return of all Asian and British properties that had been expropriated under Amin.

### THE MUSEVENI PERIOD

While Obote II was engaged in agreements with the International Monetary Fund (IMF) and World Bank, armed struggle for democratic transformation in Uganda was engaged symbolically and successfully by a political coalition led by Yoweri Museveni that became the National Resistance Movement (NRM).<sup>6</sup> A hostile international environment meant that the NRM had to

---

<sup>6</sup> Museveni's National Resistance Army (NRA) became the NRM after taking power in 1986.

rely predominantly on internal capacity to wage a protracted people's war against the Obote II regime. When Yoweri Museveni assumed power in January 1986, he was faced with the challenge of not merely restoring but crafting democracy in a fragmented society while concurrently reconciling promises he had made to his supporters with the global agreement/vision he would be obliged to accept if he wanted financial assistance to rebuild his shattered country.

Museveni was initially opposed to conditional support from the IMF and World Bank but capitulated after serious economic problems began to arise during his government's first year. Museveni devalued the Uganda shilling, began civil service reform, removed subsidies on food and other basic necessities, and promoted privatization of state parastatals and utilities. The expansion of the export sector as a stimulant to growth and improved foreign exchange earning to pay back debt, another of the SAP prescriptions, was destined to be a slower process. Investors had to be enticed back to Uganda and, more critically, the people had to be convinced of the necessity for new land law. From the outset, the new land law was destined to promote individualization; pull the *de facto* into the *de jure*; provide for some form of registration of land rights; and promote land markets. More important was how this modernization orthodoxy on land would square up against the political and economic interests of the Baganda powers; the expectations of the *bibanja* holders; the reality of rural subsistence farmers; and the highly politicized urban population. Museveni needed years and all the political savvy he could muster to be able to answer these questions.

### **The 1995 Constitution**

The Constituent Assembly (CA) Committee handling land issues stressed that its recommendations were aimed at redressing the anomalies introduced by colonialism. Its key recommendation was to vest land in the citizens of Uganda. The Committee argued that colonialism had taken the land away from the people and vested



it in the state, first as Crown Land and, after independence, as Public Land. Vesting the land in the people, in accordance with four tenure systems—customary, freehold, mailo and leasehold—would effectively return it to the masses, having been dispossessed of it by the state. The decision to reinstate mailo and freehold land, as Amaza (1998) pointed out, made a farce of the committee's pledge to redress past anomalies. A committee acting in accordance with pre-established principles would have abolished mailo, undoubtedly the worst of the past anomalies as it dispossessed the *bakopi* of land.

The restoration of mailo was interpreted as a concession to the powerful Baganda landowners, but made it difficult to address landowner-occupant relations on mailo land. The CA was unable to come to an agreement on this issue, and therefore decided that it was the role of Parliament, within two years after the 1995 Constitution took effect, to enact an appropriate law to regulate the relationship between the lawful and *bona fide* occupants of land and the registered owners. Further, the law would accord occupants acquisition of a registrable interest in land.

Consistent with vesting land in the people was the agreement that any lease granted to a Uganda citizen out of public land could be converted to freehold in accordance with the law to be passed by Parliament. For the first time in Ugandan history, customary occupation was recognized as a land tenure instead of occupation on another form of tenure (e.g., public land) and customary tenants being subject to the whims of those controlling that tenure. Parliament was tasked to prepare the modalities that would facilitate the implementation of the new directive as well as the resolution of potential conflicts between customary tenants and leaseholders claiming interests over the same piece of once public land. Finally, the 1995 Constitution anticipated that land management would be decentralized to the districts. Land not claimed by customary occupants or not alienated in either freehold, leasehold, or mailo tenures would be vested in District Land Boards (DLB).

The 1995 Constitution prefigured fundamental land reforms and set the parameters for drafting the Land Bill, namely, the transformation of all land into tradable forms of ownership. While not stated directly as an objective, the direction is consistent with the orthodoxy of land individualization that had been promoted since the 1950s. Also consistent with the past was the stated need to resolve dual interests in mailo land and the persistent inability to agree how this should be achieved. Essentially it was a political question. Whose rights should prevail—the landowners’ or the occupants’—if it’s the latter, who would pay?

### **The Land Act of 1998 (Emphasis on Mailo Land)**

The Land Act created the institutions through which rights to land could be formalized and recorded. The Act did not create rights to land *per se*; these had already been established through a long process of *de jure* law and *de facto* practice during an era of weak government enforcement. Traditional law, “dependent on a chief’s whim,” made way for a modern, predictable set of rules based on reason. Nonetheless, formal recognition of “what everyone knows” has produced a Land Act that is complex, subject to interpretation and open to contest, as the following discussion conveys.

The Land Act subjects registered owners to the rights of lawful and *bona fide* occupants. A legal occupant is one who occupies land by virtue of the repealed *Busuulu* and *Envujjo* Law of 1928,<sup>7</sup> or who entered the land with the consent of the registered owner. A *bona fide* occupant is a person who before the coming into force of the Constitution, had occupied land unchallenged by the registered owner for twelve years<sup>8</sup> or more; or been settled on land by government. Moreover, people who gained access to land from

---

<sup>7</sup> The focus here is on Buganda, however, other similar laws that were passed and abolished in the Toro and Ankole Kingdoms.

<sup>8</sup> The 12-year period draws on the Limitation Act. This Act provides that no action for the recovery of land shall be brought after the expiry of 12 years from the time such right of action arose.

“tenants by occupancy” (i.e., lawful or *bona fide* occupants) became “tenants by occupancy” themselves and have the same rights under the Act as the occupants they transacted land with. This provision effectively legitimated informal transactions in the usufruct market that had been long practiced.

The extension of rights of occupancy to *bona fide* occupants created much controversy in Buganda. Landowners claimed that *bona fide* occupants were trespassers who had occupied land without consent and were now being rewarded for their crime. As someone said, “the bill is rewarding trespassers at the expense of registered owners!” (*New Vision*, 14 May 1998). Landowners also argued that the granting of inheritable occupancy on registered land deprives a registered owner of his/her interest in land, thus contravening Article 26 (2) of the Constitution, which provides that no person shall be compulsorily deprived of property or an interest in or right over property. The government position was that the Constitution both guarantees a qualified right to own property and provides for security of occupancy (*New Vision*, 20 May 1998).

Section 32 (9) of the Act declares that the security of tenure of a lawful or *bona fide* occupant is not prejudiced by an individual’s lack of a certificate of occupancy. In other words, the security of occupants exists with or without the formality of a certificate. So unless the occupant wishes to transact in the land or pledges it to a financial institution for credit, there is no imperative to obtain a certificate. In the view of Ben, a Kampala resident, land, whether *bibanja* or titled, always appreciates so one should not put it at risk. Ben says that land is at risk when you mortgage it with the bank for two reasons: 1) plans for investment can become mixed up by events, and then interest cannot be paid and all is lost; and 2) instability and corruption could mean that your title/certificate gets lost.

If an occupant wants to acquire a certificate of occupancy, he/she must apply to the owner for consent. The owner must inform the Land Committee of the application and a date is set to verify

and adjudicate on boundaries. The Land Committee's determination is sent to both parties and, as long as there are no rental arrears, the owner must grant consent, in the prescribed form, to the occupant. The recorder can then issue the certificate of occupancy. The recorder also notifies the Registrar of Titles, who will register the certificate of occupancy as an encumbrance on the title of the land.<sup>9</sup> While the owner possesses the right to sell the land title, it is encumbered and this will reduce its marketability. In any case, Section 37 requires an owner "who wishes to sell the reversionary interest in the land" to give the first option of purchase to the occupant. Likewise, an occupant who "wishes to assign the tenancy" must give the first option to the owner of the land. In other words, first right of purchase must go to the person with existing rights to the land.

Some landlords have complained that this requirement gives them little protection, as the occupancy is still inheritable, thus providing the opportunity, as in the past, of bringing in new occupants (purchasers) disguised as relatives (*New Vision*, 22 July 1998).

An occupant may "assign, sub-let, or pledge, create third party rights in, sub-divide and undertake any lawful transaction in the respect of the occupancy" (Section 35). However, before doing so, the occupant must have the owner's consent to the transaction. The owner may grant unconditional or conditional consent, or refuse it altogether. In the case of the latter two responses, the occupant may appeal to the Land Tribunal for a decision. No transaction "to pass any interest in land" will be "valid and effective" without consent. Thus, the decisions and actions of owners and occupiers are inextricably linked. Their respective "bundles of rights" cannot be exercised without the acquiescence of the other. Moreover, unless the occupant deems that the benefits of certification outweigh the time and costs of the process, then

---

<sup>9</sup> This will require that the system for issuing certificates of occupation and certificates of ownership be linked with the Registration of Titles system.

the Act may not be a catalyst for change between owner and occupant. Indeed, as Okoth-Ogendo (1998, p. 9) remarks:

(M)ight it not be better to acquire clean and unencumbered title from somewhere else while retaining his/her privileged status as a statutory tenant? . . . The provisions relating to the tenant by occupancy may have rendered registered land subject to them totally unmarketable in perpetuity.

Add to this process the protection of third-party interests provided by Sections 28 and 40 (women, adult, children, and people with disability), and the marketability of land is further curtailed.

Legal title was both recognized and diminished by the provision that all tenants by occupancy were required to pay 1000 sh per year (less than US\$1) in rent to the owner, regardless of the size or location of the land. There was little debate on urban/rural differences when determining rental, even though a variable rent on urban land seems reasonable, given the wider range of commercial activities and land values. As Prime Minister Kintu Musoke said:

This notional ground rent is to avoid the charge that people are staying on the land free of charge as this would amount to back-door expropriation. Furthermore . . . it should be stressed that this relationship dating back from 1928 has never been commercial but rather a social relationship. (*New Vision*, 20 May 1998)

The Prime Minister's claim of a "social relationship" could be debated at length. Before the early 1900s there were the mutual obligations of chiefs and *bakopi*. However, despite the controlled rent introduced by the 1928 Law, *bibanja* transactions became increasingly commercial as landowners demanded *kanzu*. In effect new occupants purchased *bibanja* and subsequently expected to be able to sell it even though the law forbade sales. After the 1975 LRD abolished the *Busuulu* and *Envujjo* Law and mailo ownership, there was no rent to pay and, strictly speaking, no mailo owner to demand payment. Many occupants took this opportunity to sell, divide, rent, or lend their *bibanja* without reference to the owner. If

a social relationship between owner and occupant existed, as the Minister claimed, why was it necessary for the government to regulate it through the Land Act? Why was the social value reduced to an economic dimension, which trivialized it by fixing a single value, regardless of location or size, of just 1000 sh?

Legally, with the restoration of mailo tenure, the government could not have given occupants on mailo land proprietorial rights because the Registration of Titles Act guarantees a title.<sup>10</sup> If mailo owners had been deprived of a title, the government would have been obliged to fully compensate them and to face the political consequences. Short of compensation, the government could only recognize dual rights to land and provide a legislative framework in which owners and occupants could sort it out. This compromise may well reflect the historical accretion of mailo relations—the what “is”—but it falls short of the orthodox land policy of what “ought to be.” Rather, the Land Act is a hybridization of local determination and contingency and what could usefully be appropriated from international land orthodoxy.

### **Uganda Summary**

The Land Act formalizes many of these transactions by recognizing legal and *bona fide* occupancy and the subsequent land transactions of the (now *de jure*) occupants. However, as mailo was reinstated as a tenure form in the 1995 Constitution, occupants could not be given full proprietorial rights to mailo land. This is because the Registration of Title Act provides a state guarantee on titles. Landowners had to be recognized, but so did occupants. The result is a Land Act that provides for dual rights to land. The independence or *de facto* ownership wrested by occupants over many years has been compromised by the legal reassertion of landowner's rights. Landowners may be heard complaining, “Who

---

<sup>10</sup> The Registration of Title Act is derived from the Australian system introduced by Sir Robert Torrens. Torrens believed that a land register should show the actual state of ownership, rather than just provide evidence of ownership. Under this system the government guarantees all rights shown in the land register (Hanstad 1998).

is government to give my land to people that I allowed to enter my land, or the people who have entered it without my permission?" Yet in reality they had difficulty asserting their title rights. Now landowners have an enforceable bundle of rights as do occupants. The difficulty is that their respective bundles of rights cannot be exercised without the acquiescence of the other. Securing a certificate of occupancy and all subsequent transactions (to assign, sublet, pledge, create third-party rights, and subdivide) can only be conducted with the landowner's consent. If consent is unreasonably withheld, the occupant can take the matter to a land tribunal. If either the landowner or the occupant wishes to sell his bundles of rights, he must give first right of purchase to the other. This is a different scenario from one predicated on *bibanja* holders securing their tenure and being in a position to competitively sell out their holding. Rather than sorting things out once and for all, as President Museveni wanted, the Land Act has put fetters on the market vis-à-vis both use rights and mailo titles subject to occupancy. Of course, landowners and tenants could agree to buy out the other's interest. But how do they assess the market value? On the one hand, there is no strong demand for encumbered land so it could be argued that the owner's residual rights are worth very little. On the other hand, they are worth a lot to the occupant who stands to gain unencumbered title rights. If the landowner wishes to buy out the occupant, what is the market value of the occupancy? The occupant can't sell it without the owner's consent, but the owner can't buy it without the occupant's consent. Does that reduce or increase its value? And what about other non-monetary values in land that influence owners' and occupants' incentives and disincentives for purchase or sale?

The intention of international land policy discourse is to act on land through governance arrangements in a way that reconfigures each of the material, political, subjective and social dimensions of people's relationships with land. In conventional discourse, land is property and contests about land revolve around conflict between people desiring to control this resource and deny access to others.

Land laws are required to secure individuals' rights to this singular value and to exclude others. The multiple meanings of land found in a country like Uganda are collapsed into a singular value, a monetary relationship, arbitrated by the market. Of course, people do have market relations; land is regularly transacted between willing buyers and sellers. But convention presumes that people's relationships with land can be collapsed and equated with conflict over economic value. If this proposition were to be effectively applied, people would be less able to sustain and articulate the plethora of political, social, and personal identities based on land that are critical to securing and sustaining access to land.

## CONCLUSION

The processes of informalization and formalization of land in Uganda have been taking place for over 100 years. Historical analysis points to a pulling down of *de jure* law into *de facto* practice, in other words, a hybridization, or "in-betweeness," of the *de jure* and *de facto*. The Land Act of 1998 provides an administrative framework for owners and occupants to register their interests in land. Nonetheless, no change will be effected until the Land Act is implemented through the decentralized structures provided for in the Land Act. Operationalizing these institutions has proven slow and difficult. This is not surprising, since the concept of "decentralized administration" had received little attention prior to the passage of Land Act. Political credibility is threatened by financial, resource, and bureaucratic constraints and increasing evidence of the jurisdictional overlaps and unfunded mandates common to decentralized governance ambitions. The longer it takes to implement the Land Act, the greater the opportunity for owners and occupants to make their own interpretations of the law for land transactions. For many Kampala residents the government did not have the right to determine land relations. As one respondent in my research said, "(As) governments come and go, only land ownership is permanent and owners should have the right to decide." Another stated: "For sure the government wants



to take the people's land under the guise of streamlining land matters in Uganda." It did not make sense to the Baganda for government to say it was streamlining land matters when no one was having any trouble with the current land arrangements. He concluded: "If one disturbs a beehive during midday sunshine he should be ready for the consequences when the bees come out," implying the government was courting danger. The less visible the Museveni Government is in implementing the Land Act, the more comparisons with past governments inability to effect *de jure* law are underscored. As Angel (2001) writes:

In my opinion, it is the popular struggle for security of tenure through the occupation of lands, the gradual construction of improvements on them, and the gradual accumulation of property rights to those lands, that (have) been at the heart of creating this enormous wealth that de Soto celebrates, yet somehow takes as *given*. This process . . . has indirectly relied on and benefited from weak governments, weak legal frameworks, weak property registration, and weak enforcement for its unprecedented success in accumulating the enormous wealth so well documented by de Soto. But I very much doubt that this could have occurred had all these countries already possessed the West's legal frameworks and police powers that he so cherishes. . . . The integration of informal wealth into the network of commercial exchange . . . is in fact already taking place, and, in many ways, it is inevitable.

In other words "informality is as pronounced in the culture of government as it is in the market place" and the "parallel incidence of informality is not happenstance" (Schick 1998). Formalization or legality, in all its guises, requires governments that enforce, and are seen to enforce, legal and contractual rights uniformly, predictably, and without favor. Without confidence in government's ability to act without fear or favor, the land and housing assets that have been won by the poor and that are rights inscribed in the heart, will not be offered up to formalization processes. This is the challenge for the Philippines, as underscored

by the World Bank (2000b) report, *Philippines Growth with Equity: The Remaining Agenda*.

The World Bank reports on two important programs to help low-income groups “get access to tangible assets,” namely, the National Shelter program (NSP) of 1986 for housing and the Comprehensive Agrarian Reform Program (CARP) of 1988. Says the NSP report:

Although it has involved great expenses . . . there is little evidence that . . . the NSP made much of an impact on the housing conditions of the poor (World Bank 2000b, p. 17).

CARP was intended to transfer the ownership of 8 million hectares of land over 10 years, but is lagging behind schedule with less than 60 percent of the targeted area for compulsory acquisition redistributed after more than 10 years. Moreover, the modalities under which land reform is supposed to take place are becoming increasingly controversial:

First, questions have been raised as to whether the approach may not be too centralized to allow active participation by beneficiary communities, proper accountability, and adequate provision of complementary services that are necessary to realize the full productive potential of land reform projects. There is also concern that—by reducing access to land through rental and share-cropping—current land reform legislation may actually reduce access to land for the poor. Finally, a lack of a sustainable source of financing makes the program dependent on political lobbying and congressional appropriations that are not always guided by the needs of the poorest. (World Bank 2000b, p. 45-46)

The World Bank (2000a cited in World Bank 2000b, p. 96) has recommended that:

A national strategy for fighting corruption in the Philippines should focus on reducing opportunities and motivation for corruption and should make corruption a high-risk, low-reward activity.

For such a strategy to be effective, it is important to overcome the public's scepticism by showing clear evidence "that something is being done to suppress corruption and that offenders are being brought to book" (World Bank 2000b, p. 96). Moreover, the eradication of corruption must go hand in hand with a recognition of the social role of land in society if market oriented land reforms that treat land purely as an economic asset are not to "displace higher quality relations as they proceed" (Reeve 2001).

Karina Constantino-David (2001, p. 232) describes development in the Philippines as "parasitic" in that it excludes the poor in a blind pursuit of economic growth through global competitiveness and foreign investment, resulting in a deteriorating quality of life among Filipinos. She identifies five distinct but overlapping power groups—the state, business, the dominant church, the media, and international aid agencies—that share responsibility for the present situation. Attention to the form and process of development is critical, as Reeve (2001) poignantly argues:

De Soto nowhere betrays any awareness that if all of the assets he describes as readily capitalizable in the Third World were capitalized, and nothing more, they would all be owned with newly formalized certainty by agencies of the First World in less than a decade. To every extent the resources of the Third World are made monetizable and exchangeable for money, the First World will yet have much more money and a much greater capacity to create money and can thus buy them all and own them as formally as you please.

## REFERENCES

- Angel, S. 2001. Comments on Hernando de Soto's *The Mystery of Capital* [online]. (<http://interplan.org/html/RoundtableIntro.html>).
- Anon. 2001. No Title. *The Economist*. March 31–April 6.
- Amaza, O.O. 1998. *Museveni's Long March: from Guerrilla to Statesman*. Kampala, Uganda: Fountain Publishers Ltd.
- Constantino-David, K. 2001. Unsustainable Development: The Philippine Experience. In *Development in Practice* 11(2&3):232–241.
- De Soto, H. 2000. *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*. New York: Basic Books.
- Hanson, H. 1997. When the Miles Came: Land and Social Order in Buganda, 1850–1928. Ph.D. dissertation. University of Florida.
- Hanstad, T. 1998. Designing Land Registration Systems for Developing Countries. *American University International Law Review* 13(3):647-703.
- Hoogvelt, A. 1997. *Globalisation and the Postcolonial World*. London: Macmillan Press Ltd.
- Kabwegyere, T. 1975. Land and the Growth of Social Stratification in Uganda. In *Journal of Eastern African Research and Development* 5(1):1–17.
- Okoth-Ogendo, H. 1998. Legislating Land Rights for the Poor: A Preliminary Assessment of Uganda Land Act 1998. A paper presented at Uganda Land Alliance Strategic Planning Workshop, Mukono, Uganda.
- Oloka-Onyango, J. 1995. Constitutional Transition in Museveni's Uganda: New Horizons or Another False Start. *Journal of African Law* 39(2):156–172.
- Ovonji, I. 1990. Constitutional Government and Human Rights in Uganda. *Lesotho Law Journal* 6(1):207–250.
- Reeve, B. 2001. The Mystery of Capital: A Review [online]. (<http://www.spectacle.org/0401/reeve.html>).

- Schick, A. 1998. Why Most Developing Countries Should Not Try New Zealand Reforms. *The World Bank Research Observer* 13(1):123–31.
- West, H.W. 1972. *Land Policy in Buganda*. Cambridge University Press.
- World Bank. 2000a. *Combating Corruption in the Philippines*. Manila, Philippines: World Bank.
- World Bank. 2000b. Philippines Growth with Equity: The Remaining Agenda. A World Bank Social and Structural Review. Washington, D.C.: World Bank.